

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

SUFFOLK, ss.

OE-140

IN RE: SHELLEY M. JOSEPH

ORDER

The Motion for Partial Reconsideration of Suspension Order is hereby ALLOWED as follows: the court's Order of April 25, 2019, is REVISED and it is ORDERED that Judge Shelley M. Joseph be suspended with pay from her duties as an Associate Justice of the District Court until further order of this court. It is further ORDERED that Judge Joseph receive her compensation and all other benefits that would have been due to her if this Order had been issued on April 25, 2019, the date of her initial suspension.

Judge Joseph's request for reassignment to administrative duties during the pendency of her suspension is DENIED.

Five Justices join in this Order, but for different reasons set out in the two attached concurrences. Justice Gaziano dissents from that part of this Order suspending Judge Joseph with pay for the reasons explained in his attached dissent. Justice Lowy is recused.

<u>RALPH D. GANTS</u>	)	Chief Justice
	)	
<u>BARBARA A. LENK</u>	)	
	)	
	)	Justices
<u>KIMBERLY S. BUDD</u>	)	
	)	
	)	
<u>ELSPETH B. CYPHER</u>	)	
	)	
	)	
<u>SCOTT L. KAFKER</u>	)	

Entered: August 13, 2019

GANTS, C.J. (concurring, with whom Lenk and Budd, JJ., join). On April 25, 2019, after a Federal grand jury indicted District Court Judge Shelley M. Joseph on charges of obstruction of justice relating to alleged misconduct in her judicial office, the Justices of this court, in the exercise of our powers of general superintendence of the courts of the Commonwealth, suspended her without pay until further order. In our order, we made clear that her suspension without pay was based solely on the fact that she had been indicted "for alleged misconduct in the performance of her judicial duties," and that the suspension "in no way reflects any opinion on the merits of the pending criminal case."<sup>1</sup>

In deciding to suspend Judge Joseph without pay, we recognized that, if the judge were an employee of the Trial Court, her suspension without pay would be required by § 16.600B of the Trial Court's Personnel Policies and Procedures Manual (rev. 2017) (Trial Court personnel policy), which provides in relevant part: "An employee who is indicted for misconduct in office ([G. L. c. 30, § 59]) or who is the subject of a criminal complaint or indictment for a felony not involving misconduct in

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<sup>1</sup> We also noted that the Code of Judicial Conduct prohibits all judges from making "any statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any Massachusetts court." S.J.C. Rule 3:09, Canon 2, Rule 2.10 (2016).

office, shall be suspended without pay until the conclusion of the criminal proceedings." We concluded that, where the Trial Court policy mandated suspension without pay for a Trial Court employee who is indicted for misconduct in office, a judge should be treated no differently under our superintendence authority.

Judge Joseph, through counsel, has moved for partial reconsideration of our suspension order. She asks that her suspension be with pay, rather than without pay. She also asks that she be suspended only from her judicial duties and that she be reassigned to administrative duties during the pendency of her suspension. On June 26, 2019, we conducted a nonevidentiary hearing to permit Judge Joseph's counsel to present oral argument.<sup>2</sup> With the benefit of that briefing and argument, we then considered anew our decision to suspend Judge Joseph without pay. After careful deliberation, a majority of the Justices of this court conclude that suspension with pay is more appropriate under these circumstances. I now set forth my reasons for coming to this new conclusion.

This court has exercised, on rare occasions, its superintendence authority to suspend a judge without pay. See,

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<sup>2</sup> We also considered the amicus briefs submitted by retired Massachusetts judges and justices, and by the Massachusetts Bar Association, the Women's Bar Association of Massachusetts, and the Massachusetts Academy of Trial Attorneys.

e.g., Matter of Markey, 427 Mass. 797, 808 (1998) (judicial misconduct resulted in public reprimand and three-month suspension without pay). See also Matter of Estes, Supreme Judicial Ct., No. OE-0136 (May 24, 2018) (judicial misconduct resulted in public censure and indefinite suspension without pay).<sup>3</sup> Cf. Matter of Murphy, 452 Mass. 796, 801-803 (2008) (rejecting recommendation that judge be publicly censured, suspended without pay for thirty days, and assessed \$25,000 fine and costs incurred by Commission on Judicial Conduct [commission] in connection with matter, and instead imposing public reprimand and assessment of costs).

In all of these matters, this court ordered suspension without pay after an investigation of judicial misconduct by the commission (or, before the creation of the commission, the

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<sup>3</sup> I also note that the Commission on Judicial Conduct (commission), after investigation and with the agreement of the judge, has suspended judges without pay without the approval of the Supreme Judicial Court. See Matter of Murray, Supreme Judicial Ct., No. OE-0117 (Dec. 21, 2005) (commission and disciplined judge agreed to one-year suspension without pay and \$50,000 fine); Matter of Lyons, Supreme Judicial Ct., No. OE-0111 (2001) (commission and disciplined judge agreed to reprimand and three-month suspension without pay); Matter of Fitzsimmons, Supreme Judicial Ct., No. OE-0089 (Jan. 4, 1993) (commission and disciplined judge agreed to six-month suspension without pay and \$60,000 fine). In 2006, this court directed that under G. L. c. 211C, discipline of a judge, such as a suspension, censure, public reprimand, or imposition of a fine, requires action by the court. See Matter of Commission on Judicial Conduct, Supreme Judicial Ct., No. OE-0117 (Aug. 9, 2006).

Committee on Judicial Responsibility), which resulted in a finding of misconduct (or a stipulation of misconduct agreed to by the judge and the commission) and, subsequently, after hearing, a finding by this court that the judge engaged in misconduct. The suspensions without pay came in one of two forms: a suspension without pay for a fixed period of time, see, e.g., Matter of Markey, 427 Mass. at 808 (three-month suspension), or a suspension without pay for an indefinite period of time, to allow the Legislature to make a determination whether to remove the judge from office (which in each case resulted in the judge's resignation), see Matter of Estes, supra (public censure and indefinite suspension).<sup>4</sup> In each of these cases, the court had access to the evidence relied upon by the commission (or a stipulation of misconduct), and made a determination of judicial misconduct based on that evidence. In none of these cases, however, was the judge indicted for a felony or, indeed, charged with any crime.

A criminal indictment, regardless of its ultimate merit, impairs public confidence in the ability of the indicted judge

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<sup>4</sup> In Matter of Bonin, 375 Mass. 680, 711 (1978), the court ordered that the then Chief Justice of the Superior Court be publicly censured and that he be suspended for a "reasonable time" to allow the executive and legislative branches to consider whether he "should continue to serve and to receive compensation." The decision is silent as to whether the suspension was with or without pay.

to perform his or her judicial duties during the pendency of the indictment. Judge Joseph, through counsel, is cognizant of the issue of public confidence arising from a criminal indictment and, for that reason, does not seek reconsideration of the court's decision to suspend her from her judicial duties pending the adjudication of her criminal case.

As acknowledged by Judge Joseph's attorney at oral argument, the existence of a criminal investigation and an indictment often makes it difficult in practice for this court, either through the commission or another designated finder of fact, to obtain the evidence necessary to make a finding regarding judicial misconduct. Grand jury information is confidential as a matter of law, and can be disclosed only pursuant to court order.

Considered together, these two consequences mean that a judge who is under criminal indictment generally must be suspended from the performance of judicial duties to preserve public confidence in the judiciary pending the adjudication of the judge's criminal case. But the court usually cannot evaluate the merits of the criminal accusation carefully and independently until the criminal case has been resolved. The existence of the indictment means that a prosecutor presented evidence to a grand jury, who found probable cause that the judge committed the crime charged. But this court does not know

what evidence was presented to the grand jury. Even if the court were confident that the evidence supported a finding of probable cause, that finding alone would not suffice to justify a disciplinary sanction for the alleged misconduct. Compare Matter of Bonin, 375 Mass. 680, 690 (1975) (findings of fact "are established by a fair preponderance of the evidence"), with Paquette v. Commonwealth, 440 Mass. 121, 132 (2003), cert. denied, 540 U.S. 1150 (2004) ("Probable cause is a relatively low threshold, requiring only sufficiently trustworthy information to instill in a reasonable person the requisite belief of criminality" [citation omitted]). Therefore, where a judge is suspended based solely on an indictment, the suspension is not a disciplinary sanction because the indictment alone would not be sufficient to justify a disciplinary sanction against a judge. Yet, for all practical purposes, a suspension without pay in these circumstances might be longer than any disciplinary suspension without pay this court has ever imposed, apart from the suspension of indefinite potential length that we imposed in Matter of Estes, Supreme Judicial Ct., No. OE-0136 (May 24, 2018).

Consequently, where a judge is indicted, this court is left with two poor alternatives regarding the exercise of the court's superintendence authority. A suspension with pay would mean that public funds would be used to pay a judge who reasonably



should not perform his or her duties during the pendency of the criminal case, which might last months or even years. A suspension without pay would mean that public funds would be spared, but the judge would have to bear the financial burden of going without a paycheck for months or even years in order to preserve his or her ability to return as a judge if he or she is found not guilty of the criminal charges. And a suspension without pay may do more than burden an individual judge. In turbulent times, the risk of being stripped of a paycheck may have a chilling effect on a judge's willingness to challenge the conduct of a prosecutor and thereby diminish the over-all independence of the judiciary, even if the judge were confident that he or she ultimately would prevail at trial if the prosecutor were to bring criminal charges against him or her.

The Legislature, with respect to officers or employees within the executive branch or any governmental authority, addresses this dilemma by granting the Governor the discretion to suspend without pay any such officer or employee who "is under indictment for misconduct in such office or employment or for misconduct in any elective or appointive public office, trust or employment." G. L. c. 30, § 59.<sup>5</sup> But it also provides

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<sup>5</sup> The Governor's authority to suspend an officer or employee under G. L. c. 30, § 59, does not apply to judges. The following provision most clearly reveals this point: "During the period of any such suspension, the appointing authority may

that, "[i]f the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he [or she] was indicted, his [or her] suspension shall be forthwith removed, and he [or she] shall receive all compensation or salary due . . . for the period of his [or her] suspension." Id. In short, the Governor may, but is not required to, suspend an officer or employee without pay, but the officer or employee must be made whole through back pay if the criminal case ends without a guilty finding.

As earlier noted, the Trial Court personnel policy does not merely permit the suspension without pay of a court employee who is under indictment for misconduct in office; it mandates suspension without pay. And while G. L. c. 30, § 59, guarantees that an executive branch employee who is not found guilty will receive all back pay, the Trial Court policy is silent on this point. To be sure, nothing would bar the Trial Court or this court, pursuant to its superintendence authority, from providing a judge back pay once his or her criminal case ends without a

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fill the position of the suspended officer or employee on a temporary basis, and the temporary officer or employee shall have all the powers and duties of the officer or employee suspended." Id. A judge who is indicted and subsequently suspended from judicial duties remains a judge, and the Governor could not temporarily appoint a new judge to perform the suspended judge's judicial duties pending final adjudication of his or her criminal case.

guilty finding, but the policy itself does not appear to require it.<sup>6</sup>

This court has always recognized that judges, clerks, probation officers, court officers, and other court staff are part of a judicial team, and that the quality of justice depends on the work of everyone. This court initially concluded that it would be fundamentally unfair to treat a judge differently from any other member of the judicial team in the event of a criminal indictment. Our concern about the unfairness of that result was magnified here, where a judge and a court officer have both been indicted and, but for the court officer's retirement, our departing from Trial Court policy would have meant that the judge was suspended with pay and the court officer was suspended without pay.

But I have now come to the view that two other important considerations must override the concern with such disparity of treatment. First, and most important, is judicial independence. "The judiciary's independence from the other branches of government and from outside influences and extraneous concerns has been one of the cornerstones of our constitutional

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<sup>6</sup> I note that § 10.6 of the Supreme Judicial Court Personnel Manual (rev. 2015) provides: "A Supreme Judicial Court employee may be suspended without pay by the Chief Justice or [his or] her designee pending disposition of criminal charges against the employee" (emphasis added).

democracy, intended to ensure that judges will be free to decide cases on the law and the facts as their best judgment dictates, without fear or favor." Matter of the Enforcement of a Subpoena, 463 Mass. 162, 169 (2012). Other court employees, especially clerks, have certain adjudicative responsibilities, but the role of a judge in making judicial decisions is unique and singular. As much as this court respects the usual integrity of prosecutors and grand juries, we cannot delegate to them the decision to suspend a judge without pay through the issuance of an indictment, where any such indictment is based solely on a finding of probable cause and where the process due for returning an indictment is far less than the process due for returning a guilty verdict.

Second, the practical consequence of a suspension without pay is more severe when imposed against a judge than when imposed against a court employee. A suspended judge remains a judge, and therefore remains subject to the Massachusetts Code of Judicial Conduct, which severely restricts a judge's opportunity to earn income during the period of suspension. See S.J.C. Rule 3:09, Canon 3, Rules 3.8-3.12 (2016). A judge during suspension may not practice law, serve as a mediator or arbitrator, or serve as an officer or employee of any business entity. Id. at Rules 3.9, 3.10, 3.11. For all practical purposes, a judge may earn income during a period of suspension

only from teaching and writing, which, for most judges, is unlikely to yield substantial earnings. See id. at Rule 3.12 & comments 1, 2. See C. Gray, A Study of State Judicial Sanctions 31 (2002) ("The effect on the judge's income of a suspension without pay is the same as for a removal . . . . In fact, because a judge may not practice law while suspended, the effect may even be more detrimental than removal"). A court employee is not subject to the Code of Judicial Conduct.

I therefore conclude that our order suspending Judge Joseph without pay should be vacated and that instead she should be suspended with pay, and receive all salary and other benefits that would have been due to her if this order had been made on April 25, 2019 -- the date of her initial suspension.

We have also considered Judge Joseph's request that she be reassigned to administrative duties during the pendency of her suspension so that she can in some fashion earn the salary she is due. We have declined to grant this request. I join the court in this decision for only one reason. As Judge Joseph's attorney acknowledged during oral argument, if a judge were indicted for certain misconduct, such as bribery, it would not be appropriate to permit that judge to perform administrative duties while he or she awaits trial. If this court were to allow a judge under indictment to perform these duties, we would first have to look beyond the fact of the indictment and

evaluate, based on the nature of the charges and the weight of the apparent evidence, whether it would be appropriate for the judge to do so. This would be a difficult task here, where we do not have access to the evidence before the grand jury.

Therefore, the more prudent course is to bar Judge Joseph during her suspension from being reassigned to perform administrative duties.

I recognize that this means that an indicted judge will be paid from public funds but will not be able to earn that salary through the performance of judicial or other duties. I also recognize that, in the eyes of the general public, this is not a productive use of public funds. I agree, but I think it is the best of the bad alternatives under these circumstances. I also note that, in this regard, Massachusetts judges would be treated the same as Federal judges under indictment, who also are suspended with pay. See United States v. Hatter, 532 U.S. 557, 560 (2001) (art. III, § 1, of United States Constitution guarantees that compensation of Federal judges shall not be diminished during their continuance in office). See also Johnson v. United States, 79 F. Supp. 208, 210 (Ct. Cl. 1948) ("When a person is appointed to the office of United States District Judge he becomes entitled to draw the salary of this office so long as he continues to hold it. He continues to hold

it until he voluntarily relinquishes it or is ousted by impeachment or death").<sup>7</sup>

I acknowledge the argument of the amici, joined by Judge Joseph, that the Massachusetts Constitution prohibits the suspension of a judge without pay pending adjudication of the criminal case. I need not reach this issue, where I have determined under our superintendence authority that suspension with pay is more appropriate. I also do not reach the issue whether there might be circumstances where it would be appropriate to suspend a judge without pay, such as where a judge is indicted for bribery and the court has access to a videotape recording or other strong evidence reflecting the

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<sup>7</sup> Unlike Massachusetts, a number of States address the suspension of a judge in their State Constitutions, statutes, or court rules. A survey of other States reveals that of those with Constitutions, statutes, or court rules concerning suspension with or without pay of a judge under indictment, at least thirteen provide for suspension with pay, see Alaska Stat. § 22.30.070; Ariz. Const. art. 6.1, § 2; Ark. Code Ann. § 16-10-409 (a)(1); Cal. Const. art. VI, § 18; Ga. R. Jud. Qualifications Comm'n, Rule 15 (A)(1) (2018); Ind. Const. art. 7, § 11; Minn. Stat. § 490A.02; Mo. Const. art. V, § 24(4); Nev. Rev. Stat. 1.4675(1); N.D. Cent. Code § 27-23-03(1); Ohio R. Sup. Ct., Rules for Gov. of Jud., Rule III § 6; R.I. Gen. Laws 8-16-8(c); Vt. R. Sup. Ct., R. Disciplinary Control of Judges, Rule 5(1). At least six provide for suspension either with or without pay, see Haw. R. Sup. Ct. 8.12(a); Md. Rules, Judges, Rule 18-442; N.Y. Const. art. VI, § 22; Pa. Const. art. V, § 18(d)(2); Tex. R. Removal or Retirement of Judges, Rule 15(a); W. Va. R. Judicial Disciplinary Proc., Rule 2.14. At least three provide for suspension without pay. See Conn. Gen. Stat. § 51-51p; N.M. R. Review Judicial Stds., Rule 27-201(C); Wyoming Const. art. 5, § 6(f).

judge's acceptance of the bribe. It suffices to say that there is no such evidence in this case.



KAFKER, J. (concurring, with whom Cypher, J., joins). I write separately to emphasize that the temporary suspension of a judge with, instead of without, pay after the judge has been indicted for misconduct in office should be the exception, not the rule. For all other State employees, an indictment for misconduct in office inevitably results in a temporary suspension without pay. As the public's confidence in the judiciary is dependent on the judiciary holding itself to higher, or at least not lower, standards than all other employees and not giving itself special protections or privileges, I believe that only the most compelling justification will allow differential treatment of a judge who has been indicted for a criminal offense involving misconduct in office. One such justification is an indictment that poses a realistic threat to the independence of the judiciary itself.

A review of criminal indictments of judges around the country reveals that the typical cases involve financial impropriety, in particular the acceptance of financial remuneration in return for favorable judicial actions. See, e.g., In re Shenberg, 632 So. 2d 42, 44, 47 (Fla. 1992); Matter of Coruzzi, 95 N.J. 557, 563 (1984); Matter of Brennan, 65 N.Y.2d 564, 564 (1985). Other cases involve money laundering, see Matter of Gross, 5 N.Y.3d 325, 326 (2005); conspiracy, see Matter of Ferguson, 304 S.C. 216, 217 (1991); or other crimes

unrelated to the performance of judicial duties. Indictments in such cases have not been found to threaten judicial independence in any way. Probable cause findings by a grand jury in these cases generally also have been found sufficient to justify interim orders for temporary suspensions without pay. See, e.g., In re Shenberg, supra at 46 (suspension without pay for two indicted judges warranted, in part, because "we think it is significant that a grand jury indicted them. The grand jury's indictments carry an indicia of reliability because the charges are made by an independent body that bases its findings on sworn testimony"); In re Melvin, 57 A.3d 226, 240 (Pa. Ct. Jud. Disc. 2012), quoting Gilbert v. Homar, 520 U.S. 924, 933 (1997) (probable cause sufficient to suspend judge without pay as court was not "called upon . . . to decide whether [judge] actually did the things with which she has been charged, . . . . Rather, our function here is to ascertain what it is upon which the charges are based in order to determine whether 'there are reasonable grounds to support [the] suspension without pay'"). See also Fed. Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 241 (1988) (Federal Deposit Insurance Corporation's suspension of bank's president<sup>1</sup> before hearing did not violate due process

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<sup>1</sup> The United States Supreme Court did not expressly state in Fed. Deposit Ins. Corp. v. Mallen, 486 U.S. 230 (1988), whether the bank's president was suspended with or without pay. The Court recognized this omission in a subsequent case, but noted

because "[a] grand jury had determined that there was probable cause to believe that [president] had committed a felony. . . . [Probable cause] should certainly be sufficient, when coupled with the congressional finding that a prompt suspension is important to the integrity of our banking institutions, to support [suspension]").

It is only in the most exceptional case involving an indictment of an individual judge for misconduct in office that a realistic threat is posed to the independence of the judiciary itself. For the reasons discussed in detail infra, however, I believe that these concerns may exist in the instant case. On reconsideration, I conclude therefore that Judge Joseph should be suspended with pay. Regardless, however, of the outcome of the criminal proceedings, because judges are held to the highest standards of conduct, especially in the court room, a Commission on Judicial Conduct investigation still may result in a recommendation for particular discipline, which could include sanctions from reprimand to indefinite suspension without pay. See, e.g., *Matter of Estes*, Supreme Judicial Ct., No. OE-0136 (May 24, 2018).

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that "[o]ur opinion in Mallen certainly reflects the assumption that the suspension would be without pay." Gilbert v. Homar, 520 U.S. 924, 931 n.1 (1997).

To my knowledge, this is one of the first instances, if not the first instance, where this court has been confronted with an indictment of a sitting judge. Many other State supreme courts, however, have addressed the problem. See, e.g., In re Shenberg, 632 So. 2d at 47; Matter of Brennan, 65 N.Y.2d at 565; Matter of Ferguson, 304 S.C. at 218-220; Matter of Grubb, 187 W. Va. 228, 231 (1992). Based on either express or implied powers, the State supreme courts of those States have concluded that they have the power to issue interim orders to address such indictments. I conclude likewise that our superintendence authority gives us both the responsibility and the authority as a matter of judicial administration to fashion an appropriate response. See G. L. c. 211, § 3 ("the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, . . . and it may issue such . . . orders . . . as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration"). See also Matter of DeSaulnier (No. 1), 360 Mass. 757, 759 (1971) ("this court has jurisdiction to impose appropriate discipline upon a member of the bar, who is also a judge, for misconduct or acts of impropriety, whether such acts involve his [or her] judicial conduct or other conduct"). This includes the

authority to impose a temporary suspension without pay, which, as this court has noted, does not constitute a removal of the judge. Matter of Markey, 427 Mass. 797, 804-805 (1998). See Matter of Ferguson, supra at 218 (suspension of sitting judge does not amount to removal).

In the past, we have suspended judges without pay in connection with disciplinary proceedings where there has been an admission or finding of some wrongdoing on a judge's part. See, e.g., Matter of Markey, 427 Mass. at 799, 808. See also Matter of Estes, Supreme Judicial Ct., No. OE-0136 (May 24, 2018). At issue in the instant case is whether we have the authority to issue an interim order temporarily suspending a judge's pay prior to the completion of the disciplinary process. I conclude that we do when such an interim order temporarily suspending a judge's pay is necessary to maintain the integrity of the judicial system, and the public's confidence in it. "[T]he inherent common law and constitutional powers of this court, as the highest constitutional court of the Commonwealth, to protect and preserve the integrity of the judicial system and to supervise the administration of justice" support this authority.<sup>2</sup>

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<sup>2</sup> Several other State supreme courts have found such inherent authority absent express State constitutional provisions to the contrary. See, e.g., Matter of Ferguson, 304 S.C. 216, 218 (1991); Matter of Grubb, 187 W. Va. 228, 231 (1992).

Matter of DeSaulnier (No. 1), 360 Mass. at 759. As this court has explained, to safeguard the public's trust and confidence in our courts, we hold judges to the highest ethical standards:

"That the standards imposed on judges are high goes without saying. Because of the great power and responsibility judges have in passing judgment on their fellow citizens, such standards are desirable and necessary and there should be strict adherence to them. . . . Anyone who is unwilling to accept and abide by such stringent rules of conduct should not aspire to or accept the great honor and the grave responsibility of serving on the bench."

Matter of Morrissey, 366 Mass. 11, 16-17 (1974). See Matter of Troy, 364 Mass. 15, 71 (1973) ("It is inevitable that the actions of individual judges merge in the public mind with the fairness and effectiveness of the legal process itself. So it is that there is a tendency to judge the courts, not on the dedicated and selfless service of the vast majority of judges but on the publicized misconduct of the few who fail to live up to the high standards long characteristic of the Massachusetts judiciary"). See also Matter of Killam, 388 Mass. 619, 623 (1983); Matter of Estes, Supreme Judicial Ct., No. OE-0136 (May 24, 2018).

Our initial order to suspend Judge Joseph without pay, issued following the judge's indictment, was informed by these high standards, our need to preserve the public's confidence in the integrity of the judiciary, and our concern about equal treatment of judges and nonjudges given the standards set out in

the Trial Court's Personnel Policies and Procedures Manual (rev. 2017) (Trial Court personnel policy) and two statutes applicable to State and municipal officers and employees. Section 16.600B of the Trial Court personnel policy provides that "[a]n employee who is indicted for misconduct in office ([G. L. c. 30, § 59]) or who is the subject of a criminal complaint or indictment for a felony not involving misconduct in office, shall be suspended without pay until the conclusion of the criminal proceedings" (emphasis added). This provision would mandate the suspension without pay of any Trial Court employee in the circumstances faced here by Judge Joseph. It would also mandate suspension for felony complaints or indictments not involving misconduct in office.

Meanwhile, the statutes, G. L. c. 30, § 59, and G. L. c. 268A, § 25, authorize the appropriate "appointing authority" to suspend officers or employees of the Commonwealth or of any county, city, town, or district during any period such officer or employee is under indictment for misconduct in office. These statutes further provide that "[a]ny person so suspended shall not receive any compensation or salary during the period of such suspension . . . ." G. L. c. 30, § 59. G. L. c. 268A, § 25. The purpose of these statutes "is to remedy the untenable situation which arises when a person who has been indicted for misconduct in office continues to perform his [or her] public

duties while awaiting trial." Massachusetts Bay Transp. Auth. v. Massachusetts Bay Transp. Auth. Retirement Bd., 397 Mass. 734, 739 (1986) (involving G. L. c. 30, § 59).

I believe that allowing a judge under indictment, particularly a judge under indictment for misconduct in office, to continue to perform judicial duties would seriously impair the public's confidence in the integrity and impartiality of the judiciary. See, e.g., Matter of Cruickshanks, 220 W. Va. 513, 517 (2007) (authority to suspend judges following indictment, rather than conviction, "derive[s] from [court's] duty to promote and protect the honor, integrity, dignity, and efficiency of the judiciary and the justice system").

Criminal indictments of judges pose particularly grave and difficult problems. An executive branch official, bound by oath to uphold the laws and Constitution of the United States, has brought charges contending that Judge Joseph has violated several criminal laws. A grand jury has found probable cause to support such charges, and those charges have been widely publicized. Matter of Brennan, 65 N.Y.2d at 565 ("The issue before us is not of [judge's] innocence [which is presumed] or guilt, but whether in the face of the cloud created by the number and seriousness of the charges against him his pay should be continued during the period of his suspension"). Unless judges are perceived to be scrupulously honest, fair, and



impartial, their judgments cannot and will not be respected.

See In re Shenberg, 632 So. 2d at 47 (suspension of judge indicted by Federal grand jury required for "protection of the public's confidence in the judiciary").

Although an indictment is certainly not a conviction, and the legal presumption of innocence stands firmly intact and is entitled to the utmost respect, public confidence in the judiciary is still severely affected. Indeed, such an allegation does not just place the individual judge's integrity into question, but, as explained supra, the integrity of the judicial system itself. See Matter of Grubb, 187 W. Va. at 233 (where judge had been indicted, his "effectiveness as a judge and the integrity of the judiciary [had] been called into question," and court's "obligation to preserve the integrity of the judiciary and the public confidence" required suspension without pay). See also In re Shenberg, 632 So. 2d at 47; In re Melvin, 57 A.3d at 238 n.10 (noting that Pennsylvania Constitution "places the responsibility on this Court of safeguarding the integrity of the judicial system and the public's confidence therein from the time charges are filed until their final disposition").

In evaluating whether the suspension of a judge is with or without pay in these circumstances, I am mindful that the public and the press are understandably highly sensitive to, and

suspicious of, anything that could appear to be special treatment, especially special treatment of judges by other judges. If other public officials and court employees can be expected to be suspended without pay following an indictment for misconduct related to their employment, the obvious question is why should judges not be subject to the same expectations?

It is not enough to say that a judge must be suspended without pay simply because the judiciary's ability to investigate the misconduct is limited by the pending indictment. To hold as much creates a special privilege for judges. Indeed, all other public employees under indictment may be subjected to investigations by their appointing authorities and would be required either to answer questions from investigators or invoke their privilege against self-incrimination under the Fifth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. The appointing authorities nevertheless may suspend the employee without pay based on the information they are given, including the fact that the employee has refused to answer questions. See Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 826-827 (2006) (discussing implications of party invoking constitutional privileges against self-incrimination during investigation). Indictments do not categorically prevent the ability of appointing authorities to question employees and temporarily suspend them without pay.

Employees retain the constitutional right not to answer questions.

Although judges are under tighter restrictions than other public employees regarding outside employment, even while under suspension, one must be extremely cautious about using such restrictions or the financial difficulties they impose to justify differential treatment for judges. Other employees under indictment likewise face tremendous financial hardship on being suspended without pay. Indeed, indicted police officers, teachers, firefighters, and emergency medical technicians cannot practice their trades while under indictment. Indicted employees can also be expected to have great difficulty securing other employment. The hardships they face are comparable to those faced by a judge under indictment. Although I am sensitive to the fact that the Code of Judicial Conduct limits the ability of judges to obtain outside employment, and thus earn income during the period of suspension, in most instances, the prevailing public interest in preserving the public's confidence in the integrity of the judiciary must subordinate the personal interests of the judge. Matter of Morrissey, 366 Mass. at 17 (warning that those who will not put interests of judiciary above their own "should not aspire to or accept the great honor and the grave responsibility of serving on the bench").

Finally, simply invoking generalized concerns about judicial independence is not enough for differential treatment. If an indictment alone is sufficient to justify temporary suspension without pay for other public employees to preserve public confidence in government, it is sufficient for judges, unless judicial independence is realistically at issue. See Matter of DeSaulnier (No. 4), 360 Mass. 787, 809 (1972) ("judges who do not abide by [the] high and well recognized standards of personal and judicial conduct to which they must be held cannot employ the argument of judicial independence as a shield when questionable practices on their part are challenged"). As explained supra, there is generally no reason to believe that an ordinary criminal indictment of a judge for misusing his or her office for financial gain or engaging in other criminal misconduct raises any concerns about judicial independence. See, e.g., Matter of Grubb, 187 W. Va. at 229; Matter of Ferguson, 304 S.C. at 217. Moreover, the historic design of judicial independence was to protect judges during "good behavior" from arbitrary removal by the executive branch and legislative control through manipulation of their salaries; it was not meant to provide protection for criminal misconduct or other "bad behavior." See art. III, § 1, of the United States Constitution ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior . . .");

Part II, c. 3, art. 1, of the Constitution of the Commonwealth ("All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior . . ."). See Edwards, Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges, 87 Mich. L. Rev. 765, 766-767 (1989) (noting that framers intended to protect judges from "arbitrary removal from office," but that such protection is "checked, however, by the requirement of [art. III, § 1, of the United States Constitution] that the holder of a judicial office serve with 'good Behavior'"). See also Matter of Ferguson, 304 S.C. at 219 (judicial independence ordinarily not threatened by suspension of judge without pay ordered by State supreme court, as opposed to State legislature); Smith, An Independent Judiciary: The Colonial Background, 124 U. Pa. L. Rev. 1104, 1142-1153 (1976) (describing history of judicial independence in Massachusetts, particularly need to ensure that judges are protected from arbitrary removal and maintain their offices during good behavior).

In the instant case, Judge Joseph was indicted for obstruction of justice. While I cannot comment on the merits of the case, I can say that, in general, there are few more serious allegations of judicial misconduct than obstruction of justice. Judges are supposed to administer justice, not obstruct it. The public expects nothing less.

The obstruction of justice charge indicted here, however, is different from those in which judges have been accused of obstructing justice for personal gain, where courts have found no issue of judicial independence at issue. See, e.g., In re Shenberg, 632 So. 2d at 47; Matter of Grubb, 187 W. Va. at 233. The indictment also appears to require an analysis, or at least a background understanding, of what can or cannot be done by Immigration and Customs Enforcement (ICE) officials in State court houses with regard to immigrants who were in State custody, but had been released, and were thus subject only to civil detainers or civil warrants. The charges also appear to require an analysis, or at least a background understanding, of what State judges and court officers are obligated to do, and prohibited from doing, in State court houses with regard to ICE agents. The case law addressing these difficult questions is rapidly evolving, and they have been bitterly contested. Indeed, ICE has been restrained previously in State court houses by State courts, as well as by Federal courts, in contentious circumstances. See generally Lunn v. Commonwealth, 477 Mass. 517 (2017); Ryan v. United States Immigration & Customs Enforcement, 382 F. Supp. 3d 142 (D. Mass. 2019).

The Federal and State governments have staked out different and sometimes conflicting positions on what can or cannot be done with respect to immigrants who are subject only to civil

detainers or civil warrants in State court houses. An ICE policy authorizes "civil immigration enforcement actions" against "targeted alien(s)" in Federal, State, and local court houses. United States Immigration and Customs Enforcement, Directive No. 1107.2-1, Civil Immigration Actions Inside Courthouses (Jan. 10, 2018). A Massachusetts Trial Court policy states that Trial Court personnel "shall not hold any individual who would otherwise be entitled to release based solely on a civil immigration detainer or civil immigration warrant," but also permits ICE to take individuals into custody "pursuant to [a civil] immigration detainer or [civil] warrant."<sup>3</sup> Chief

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<sup>3</sup> The policy permits trial court security personnel to admit Immigration and Customs Enforcement (ICE) officials to the holding cell area to conduct a civil arrest of an individual over whom the trial court has custody "if a security department supervisor determines that the [ICE] official would otherwise take custody of the individual inside or immediately outside of the courthouse." Chief Justice of the Trial Court, Executive Office Transmittal No. 17-13, Policy and Procedures Regarding Interactions with the Department of Homeland Security (Nov. 10, 2017). When an individual in the court house is not in custody, "Trial Court employees shall neither impede [ICE] officials from [taking the individual into custody] nor assist in the physical act of taking that individual into custody." *Id.* Additionally, "[n]o [ICE] official shall be permitted to take an individual into custody pursuant to a civil immigration detainer or warrant in a courtroom, unless permission has been given in advance by the regional administrative judge or first justice sitting in the courthouse." *Id.*

The Trial Court issued updated guidance with respect to this policy following the issuance, by the United States District Court for the District of Massachusetts, of a preliminary injunction against ICE's carrying out of certain civil arrests in Massachusetts court houses, in Ryan v. United

Justice of the Trial Court, Executive Office Transmittal No. 17-13, Policy and Procedures Regarding Interactions with the Department of Homeland Security (Nov. 10, 2017).<sup>4</sup> All of this is

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States Immigration & Customs Enforcement, 382 F. Supp. 3d 142 (D. Mass. 2019). See Chief Justice of the Trial Court, Executive Office Transmittal 19-13, Employee Guidance Upon Immigration and Customs Enforcement Arrest on Courthouse Property (Jun. 24, 2019). The guidance observes that the preliminary injunction "does not affect the [earlier policy], which remains in effect and should be followed by all court personnel." Id. In particular, the guidance states that the preliminary injunction "applies only to persons who are on the courthouse property but not in custody," and thus, that "court officers should continue to follow" the earlier policy with respect to individuals brought to the court house in custody. Id. However, "[i]f a court officer observes an ICE official arrest an individual on courthouse property," the guidance requires that officer to file an "incident report." Id. Other Trial Court employees are also required to notify court officers if they "witness[] an ICE official arrest an individual on courthouse property." Id. "If the court officer learns whether the ICE arrest is criminal or civil, that information should be included within the incident report, but court officers should not investigate to determine whether the witnessed ICE arrest was criminal or civil in nature." Id.

<sup>4</sup> Compare State of New York Unified Court System, Office of the Chief Administrative Judge, Directive No. 1-2019, Protocol Governing Activities in Courthouses by Law Enforcement Agencies (Apr. 17, 2019) ("Arrests by agents of [ICE] may be executed inside a New York State courthouse only pursuant to a judicial warrant or judicial order authorizing the arrest" [emphasis added]), and California Attorney General, Guidance and Model Policies to Assist California's Superior Courts in Responding to Immigration Issues at 19 (October 2018) ("Immediate compliance is not required" with "ICE administrative 'warrant'"), with United States Immigration and Customs Enforcement, Directive No. 1107.2-1, Civil Immigration Actions Inside Courthouses (Jan. 10, 2018) (ICE policy authorizing arrest of "targeted alien[s]" in Federal, State, and local court houses), and Supreme Court of New Jersey, Directive No. 07-19, Immigration-Related Policies: Revisions to Judiciary Forms; Updated Attorney General Guidance; Court Involvement with ICE Activities (May 23, 2019) (providing



occurring while a furious political battle is waged over immigration policy that has polarized the public and intensified its interest in, and reaction to the resolution of, these difficult legal issues.<sup>5</sup>

Most importantly, at this point, one must assume that the critical facts here are contested, at least after the tape recorder was turned off. I have read the indictment, and I understand that Judge Joseph has entered a not guilty plea, so I cannot prejudge or comment on those facts.

In these circumstances, where the facts and law require much further elucidation to determine whether Judge Joseph was unlawfully obstructing Federal law enforcement or lawfully performing her judicial duties, I cannot rule out the possibility that the independence of the State judiciary itself may be implicated by the prosecution here. Without knowing all the facts, concerning which I cannot make judgments at this point, an argument can be made that the indictment implicates

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that "[a]bsent an emergency, ICE agents should conduct an arrest only after the conclusion of the relevant court event, in a non-public area," but not limiting ICE to judicially authorized arrests).

<sup>5</sup> I note that judicial independence imposes reciprocal obligations on the judiciary itself. As Archibald Cox, who famously defended the rule of law during the Watergate investigation, explained, "[a] judge whose decisions are influenced by politics is putting the independence of the courts at risk." Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. Dayton L. Rev. 565, 566 (1996).

the independence of the State judiciary and its lawful attempts to regulate the conduct of ICE in State court houses, and that the indictment may affect other State judges in the performance of their duties.

A suspension without pay raises a particular set of concerns in this context. With the facts unresolved, there remains an open question whether Judge Joseph's defense is purely personal and peripheral to her judicial responsibilities or part and parcel of the defense of the power of State judges to regulate the activities of ICE in State court houses. A suspension without pay in these circumstances therefore may impact not only Judge Joseph's financial wherewithal to continue to defend herself adequately, but also the defense of the interests of the State judiciary itself. Given the paramount importance of judicial independence, and the possibility that it may be implicated by the indictment here, I conclude that a temporary suspension with pay is appropriate in these highly unusual circumstances.<sup>6</sup>

That being said, I also recognize that this court can suspend judges without pay for misconduct that does not

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<sup>6</sup> I note that the court officer in the instant case has retired. Therefore, I need not decide the issue of differential treatment and whether an exception would have been required for him as well. If he had not retired, that would further complicate the inquiry in the instant case.

constitute a crime. Judges are held to much higher standards than the mere compliance with the criminal laws alone. Indeed, they are, and should be, held to higher standards than other State employees given their position of responsibility. As judicial independence limits the powers of the public and other branches of government to hold judges accountable, see Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. Dayton L. Rev. 565, 567-571 (1996), it is up to the judiciary itself, particularly this court, to vigilantly monitor and correct judicial misconduct. See, e.g., Matter of Ferguson, 304 S.C. at 219 (judicial independence not threatened by suspension of judge without pay ordered by State supreme court, as opposed to State legislature). Judges must be independent, but they must also be held accountable. To preserve both judicial independence and judicial accountability, and the public's confidence in the judicial system, this court must itself scrupulously exercise its superintendence function, requiring that the highest standards of judicial conduct be observed.

In my opinion, separate and apart from the criminal prosecution, there remain serious allegations of judicial misconduct that may require investigation by the Commission on Judicial Conduct. Regardless of whether Judge Joseph violated any criminal laws -- an issue on which I express no view whatsoever -- a number of questions have been raised about Judge

Joseph's handling of this matter, beginning with her decision to turn off the tape recorder. I also recognize that any investigation likely cannot proceed to completion until the criminal proceedings are concluded. Thus, even if there is an acquittal in the criminal case, there may still be findings of judicial misconduct here that merit suspension without pay. At this point, however, the facts are too unclear and contested to make any preliminary determination to that effect. For that reason, and because concerns about judicial independence have been raised by the indictment in the instant case, I conclude that suspension with pay is most appropriate.

GAZIANO, J. (dissenting). On April 25, 2019, we suspended Judge Joseph without pay "based solely on the fact that a sitting judge has been indicted for alleged misconduct in the performance of her judicial duties." We reached this unanimous result, after careful deliberations, fully aware of the minimal standard required for a grand jury to return an indictment, and knowing that the sanction of suspension without pay was harsh. We also were cognizant of the important role that judicial independence plays in our democracy. These concerns were outweighed, however, by our collective belief that it was necessary to suspend Judge Joseph without pay to preserve the integrity of the judicial system. The decision was a difficult one that was based, in large part, on our desire to treat the judge in the same manner as other State employees, most notably, other Trial Court employees. A majority of this court has now decided to reverse course and reinstate the judge's pay during the period of her suspension. Because this decision smacks of preferential treatment, and thereby erodes public confidence in the judiciary, I cannot join my colleagues.

To my knowledge, this court has never before faced the necessity of responding to the indictment of a sitting judge. Our superintendence authority gives us both the responsibility and the power, as a matter of judicial administration, to fashion an appropriate response. See Matter of Morrissey, 366

Mass. 11, 17 (1974). This includes the authority to impose a temporary suspension without pay, which, as we have noted, does not constitute the removal of the judge. See Matter of Markey, 427 Mass. 797, 804 (1998). Although previously we have imposed suspensions without pay only in connection with disciplinary proceedings where there has been an admission or finding of some wrongdoing on the part of the judge, our duty of superintendence must include the authority to suspend a judge without pay in other circumstances when we deem such a response to be necessary to uphold the integrity of the judicial system. See Matter of Morrissey, supra ("disciplinary measures [ordered by this court] have served to give assurance to the public that [inappropriate] conduct will not be tolerated and that the judiciary itself is ever ready to carry out the corrective process when necessary"). Cf. Matter of Powers, 465 Mass. 63, 85 (2013) (public good required removal of clerk from appointed position).

Our previous order, issued upon the indictment of the judge, was informed both by the Trial Court's Personnel Policies and Procedures Manual (rev. 2017) (Trial Court personnel policy) and two statutes applicable to State and municipal officers and employees. Section 16.600B of the Trial Court personnel policy provides that "[a]n employee who is indicted for misconduct in office ([G. L. c. 30, § 59]) or who is the subject of a criminal complaint or indictment for a felony not involving misconduct in

office, shall be suspended without pay until the conclusion of the criminal proceedings . . ." (emphasis added). This provision would mandate the suspension without pay of any Trial Court employee in the circumstances confronting the judge here, as well as in lesser circumstances (such as where the felony complaint or indictment does not involve misconduct in office).

In addition, the applicable statutes, G. L. c. 30, § 59, and G. L. c. 268A, § 25, authorize the appropriate "appointing authority" to suspend officers or employees of the Commonwealth or of any county, city, town, or district during any period that such officer or employee is under indictment for misconduct in office. "Any person so suspended shall not receive any compensation or salary during the period of such suspension . . . ." G. L. c. 30, § 59. G. L. c. 268A, § 25. The purpose of these statutes "is to remedy the untenable situation which arises when a person who has been indicted for misconduct in office continues to perform his [or her] public duties while awaiting trial." Massachusetts Bay Transp. Auth. v. Massachusetts Bay Transp. Auth. Retirement Bd., 397 Mass. 734, 739 (1986) (involving G. L. c. 30, § 59).

Because the suspension statutes provide no exceptions, they require "general application," Springfield v. Director of the Div. of Employment Sec., 398 Mass. 786, 789 (1986), quoting Besette v. Commissioner of Pub. Works, 348 Mass. 605, 608

(1965), and have been applied to a broad range of public employees. See, e.g., Benoit v. Boston, 477 Mass. 117, 118, 119 n.7 (2017) (emergency medical technician and paramedic); Springfield, supra at 786-787 (Springfield police officers); Massachusetts Bay Transp. Auth. Retirement Bd., 397 Mass. at 736 (Massachusetts Bay Transportation Authority employees); Letteney v. Commissioner of Commerce & Dev., 358 Mass. 10, 10-11 (1970) (director of division of urban and industrial renewal of State housing board); Caples v. Secretary of the Commonwealth, 350 Mass. 638, 639-640 (1966) (commissioner of public safety); Reynolds v. Commissioner of Commerce & Dev., 350 Mass. 193, 193, cert. denied, 384 U.S. 1001 (1966) (deputy commissioner of commerce and development); Besette, supra at 606 (division of waterways director); DeLeire v. Contributory Retirement Appeal Bd., 34 Mass. App. Ct. 1, 2 (1993) (Revere police chief); Indorato v. Contributory Retirement Appeal Bd., 20 Mass. App. Ct. 935, 935 (1985) (State police officer); Brown v. Taunton, 16 Mass. App. Ct. 614, 615 (1983) (Taunton building inspector); Dupree v. School Comm. of Boston, 15 Mass. App. Ct. 535, 535-536 (1983) (junior high school teacher).

Our order suspending the judge without pay specifically stated that the suspension was based "solely on the fact that a sitting judge has been indicted for alleged misconduct in the performance of her judicial duties" and that the suspension "in



no way reflects any opinion on the merits of the pending criminal case." As this court observed in upholding a suspension without pay under G. L. c. 30, § 59, "[i]t is the ascertainable and indisputable fact of the indictment, quite apart from guilt, that makes continuance in office unsuitable." Bessette, 348 Mass. at 608. "The purpose of the statute is to protect the public interest. No argument is needed to show that it is appropriate, and in the public interest, that an official indicted for malfeasance in office should be separated from the office pending trial . . . . The effect on the petitioner is incidental to the public purpose." Id. at 609.

I am, of course, keenly aware of the critical importance of an independent judiciary, a principle that is vital to the proper functioning of our democracy. This principle is interwoven with, and dependent upon, the public's confidence in the ability of the court system to hold judges accountable. The very notion of judicial independence gives rise to an implicit, yet fundamental compact between judges and the public: in exchange for the independence that leaves judges free to decide cases on the merits, judges resolve to comport themselves according to standards that are more restrictive than those that govern ordinary citizens. See Matter of Killam, 388 Mass. 619, 623 (1983). See also E.F. Hennessey, *Excellent Judges* 15 (1997)

("judges who do not have to face elections have a special duty of accountability by self-monitoring").

As the court has explained,

"Judges wield an awesome and final power over the liberty and property of their fellow citizens. This power is the more awesome because in this Commonwealth, as in the Federal system, we are neither elected nor subject to recall or retention elections. This power is tolerable in a democracy because judges speak only for reason and the law. . . . Therefore, this arrangement requires an exacting compact between judges and the citizenry. It is not enough that we know ourselves to be fair and impartial or that we believe this of our colleagues. Our power over our fellow citizens requires that we appear to be so as well."

Matter of Brown, 427 Mass. 146, 148-149 (1998). This "exacting compact" justifies the independent tenure that judges enjoy "during good behavior." Part II, c. 3, art. 1, of the Constitution of the Commonwealth.

Here, the judge and a court officer were indicted on charges of conspiracy to obstruct justice; obstruction of justice, aiding and abetting; and obstruction of a Federal proceeding, aiding and abetting. The court officer also was indicted on a charge of perjury. The judge and the court officer were both indicted for felonies involving misconduct in office and, under the Trial Court personnel manual, the court officer would have been suspended without pay if he had not retired from the Trial Court. Although I accept the judge's argument that she is not governed by the Trial Court personnel

manual, I believe that trust and confidence in our judicial system would be impaired by treating her more favorably than all other employees of the Trial Court. I recognize that the circumstances are highly unusual, and that some may view the fact of the indictment itself as an affront to judicial independence. Given the central and prominent role of judges in our justice system, however, the public has a right to expect that the rules applied to judges are at least as rigorous as those applied to Trial Court employees. The suspension without pay imposes on the judge no more than what would have been imposed upon the court officer indicted in this situation, as well as every other employee of the Trial Court. A few months ago, when we suspended her, we recognized that the suspension without pay would have serious financial consequences for the judge, but that we had no other option if we were to maintain public confidence in the judiciary. Nothing has changed.